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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-462

DONALD S. WEIR, JR.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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Although the respondent urges denial of the petition for certiorari, the stated opposition is conspicuously lacking in persuasion. What, for example, is "unreasonable" in expecting the Army to follow the clear and unequivocal language of its own valid regulation?

AR 635-89, in at least three instances provides: (1) *that individuals who seek to avoid military service by an unverifiable assertion of homosexuality will not be processed under*

this regulation;[1] (2) *that the commanding officer will inquire thoroughly and comprehensively into the matter;*[2] and (3) *that it is essential that all facts indicating homosexual tendencies or acts be recorded properly, and that signed statements of all witnesses be obtained.*[3]

Is it "reasonable" to assume that the vast investigative resources of the Army would be taxed unduly by making even a token inquiry on the post among his immediate fellow-soldiers and supervisor with whom he associated daily?[4] Is it not "reasonable" to assume that the Army's concern that homosexuals *will not be permitted to serve in the Army in any capacity* would require at least a preliminary inquiry among his daily military associates and peer group to determine whether others might also be involved? Further, what justifies respondent's conclusion that "there was absolutely no indication that plaintiff was lying"?

On the contrary, is it not more "reasonable" to assume that the Army was negligent in failing to recognize the emotional frustration and mental distress being experienced by a low-ranking enlisted man? Is it "reasonable" to assume that a senior-rank professional counsellor (Post Chaplain) would perfunctorily dismiss the personal problems of a basic soldier in emotional turmoil with less than the dignity of a personal conference in the privacy of his office? (PET 3)

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[1] Para. 2 b. (1), AR 635-89, Appendix, Page 53.

[2] Para. 4 b., AR 635-89, Appendix, Page 55.

[3] Para. 9, AR 635-89, Appendix, Page 55.

[4] Melvin H. Bonsall, the Battalion Sgt. Major, and immediate superior and duty supervisor, knew nothing about this until actual separation. Pet. Page 4.

Is it "reasonable" to assume that an "evaluation" made and prepared in its entirety by a newly-graduated and designated clinical psychologist, only routinely concurred in after-the-fact by the professional psychiatrist, can be characterized as "confirmed by psychiatric evaluation"? While the psychiatrist testified at the trial *that he could be wrong,* the psychologist declined to appear and referred all communications to his privately-retained lawyer.[5]

Petitioner submits that it is more "reasonable" to assume that the veteran trial commissioner (who ranks with and performs similar trial functions comparable to those of a Federal District Judge) who presided over an extended trial and saw and heard ten witnesses, including the psychiatrist, and who had ample opportunity to examine the documentary evidence of record, properly applied the law to the facts of the case.[6]

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[5] Both the psychiatrist and the psychologist served their obligated tours of military service and are now in private practice. No subpoena was issued for the psychologist on the advice of the commissioner stated during the trial. The psychiatrist agreed to appear at the request of the Army.

[6] A recent news-media release (*Washington Star-News,* Washington, D.C., Friday, November 2, 1973, at Page A-3, under heading of "People in the News") reports the following article concerning the Army and its policy of self-proclaimed homosexuals:

> **STRAIGHT ARMY**
>
> A self-proclaimed lesbian who is an Army WAC has come to Washington from her station at Ft. Sam Houston, Tex., to fight alleged Army discrimination against homosexuals, but she can't get the Pentagon to bring homosexual charges against her, Sp. 4 Dierdre A. Greene said, "I lived in hell for more than two years, afraid the Army was going to find out I was a lesbian." Now, the Army tells her, that she's told them all about it, someone needs to press charges. But not one has.

The respondent, in its opposing memorandum, re-writes the holding of this Court in *Thorpe v. Housing Authority,*[7] 393 U.S. 268, 276, and *Bowles v. Seminole Rock Co.*, 325 U.S. 419. Quoting the Court in *Thorpe v. Housing Authority:*

> "As we stated in *Bowles v. Seminole Rock Co. [supra]*, when considering an administrative regulation 'a court must necessarily look to the administrative construction of the regulation *if the meaning of the words used is in doubt* . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation'". [Emphasis added]

It is at this point that the facts of the instant case are clearly distinguishable, a determination made by the trial commissioner since this same argument was advanced at trial by the respondent.

Petitioner's "training at government expense" (OPP. 4) merits comment. Denied application for officers' training because of low mechanical aptitude, he was nevertheless assigned to power generator mechanics' school for which he had neither aptitude nor interest. Despite satisfactory completion of the course, plus an additional advanced course, no assignment to duty in this occupational specialty was ever forthcoming for him. (APP. 44) His sole duty, following this training, until rescued by the Sergeant Major for clerical duty in the battalion orderly room, was custodial clean-up work on the post.

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[7] Cited in accord: *Udall v. Tallman,* 380 U.S. 16 (1965).

Contrary to respondent's contention that "the court correctly applied settled principles of equitable estoppel" (OPP. 4), it is imperative that the trial commissioner's well-reasoned discussion and determination of this point be examined (APP. 42, 43). It should be noted that the two cases relied on by the respondent in its opposition are cited (with others) by the trial commissioner in arriving at a directly opposite result.

Finally, in representing that *due process in the instant case is not violated by Rule 147 (b) of the Rules of the Court of Claims,* the respondent does not cite any authority from this Court in support of their contention. Significantly, the Court of Claims decision cited by the respondent, *Hebah v. United States,* 197 Ct. Cl. 729, a per curiam decision of 1972, provides as follows:

> "Under our rule, the commissioner's findings of fact are presumed to be correct because of his opportunity to hear the witnesses and to determine the weight to be accorded to their testimony. A party who undertakes to overcome this presumption must make a strong affirmative showing to the contrary." (Citations omitted)
>
> "Although the presumption does not extend to the conclusions of law made by the trial commissioner, he saw and heard the witnesses and had a much better opportunity than the court to familiarize himself with all of the circumstances involved. In the light of this situation and a consideration of the record, we find that under the peculiar facts and circumstances of this case, his conclusions

are not unreasonable or unwarranted by the record."

It is precisely on this point that the petitioner is respectfully urging this Court to make a final determination of the issue. In the absence of a controlling decision by this Court on a rule which closely parallels Rule 52 (a) of the F.R.C.P., and with the ever-increasing scope of activity affecting a broader spectrum of litigants in the Court of Claims, a final determination on the point by this Court is imperative.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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8 November 1973